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## “LAWFARE” IN THE WAR ON TERRORISM: A RECLAMATION PROJECT

Melissa A. Waters\*

*In the nine years since Major General Charles Dunlap first coined the term, “lawfare” has strayed considerably from its non-partisan, ideologically neutral origins. Nowhere is this clearer than in the war on terror, where the term is often used as a pejorative label by political pundits who decry as “lawfare” virtually any attempt to apply the rule of law to the conduct of the United States’ war on terror. This essay considers the prospects for reclaiming “lawfare” as a useful term in the war on terror. It explores various conceptions of the term, noting that a more ideologically neutral usage – lawfare as “critical self-reflection” on the relationship between law and war – is gaining ground in both the scholarly and public spheres. It also argues that American lawyers and judges have a critical role to play in reclaiming the rhetorical high ground from pundits who attempt to equate the work of those involved in adjudicating terror cases with a shadowy form of “lawfare” engaged in by America’s terrorist enemies.*

### I. INTRODUCTION

On rare occasions in the evolution of the English language, a new word or concept so perfectly captures an emerging phenomenon that it catches fire. Such is the case with the term “lawfare.” Introduced into the military lexicon by Major General Charles Dunlap in 2001,<sup>1</sup> “lawfare” quickly captured both scholarly and popular imaginations. References to lawfare soon found their way into major media outlets,<sup>2</sup> and the concept even won an indirect—and highly controversial—mention in President Bush’s 2002 National Security Strategy.<sup>3</sup> Just nine years after Dunlap first

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<sup>1</sup> See Charles J. Dunlap, Jr., Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts (Carr Center for Human Rights, John F. Kennedy Sch. of Gov’t, Harvard U., Working Paper, 2001), available at <http://www.ksg.harvard.edu/cchrrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf>.

<sup>2</sup> See, e.g., Scott Malcomson, *Lawfare*, N.Y. TIMES MAG., Dec. 12, 2004; Andrew Cohen, *Bench Conference: The Vice President Wages “Lawfare”*, WASH. POST BLOG (June 21, 2007, 4:33PM), available at [http://blog.washingtonpost.com/benchconference/2007/06/lawfare\\_from\\_the\\_vice\\_presiden.html](http://blog.washingtonpost.com/benchconference/2007/06/lawfare_from_the_vice_presiden.html); *The Lawfare Wars*, WALL ST. J., Sept. 2, 2010, at A14.

<sup>3</sup> NATIONAL SECURITY COUNCIL, EXEC. OFFICE OF THE PRESIDENT, NATIONAL SECURITY STRATEGY 31 (2002) (explaining that the U.S. government will take the steps necessary to protect Americans against the potential for investigations and prosecution by the I.C.C. and

introduced the term, a Google search for “lawfare” reveals an astounding 84,600 entries, and at least two weblogs are devoted exclusively to lawfare.<sup>4</sup>

Like a great trademark that eventually becomes a victim of its own popularity, however, “lawfare” now runs the risk of losing its utility, as its original meaning becomes obscured and distorted over time. Dunlap’s concept of “lawfare” was straightforward: He defined it as “the use of law as a weapon of war,”<sup>5</sup> later clarifying that it involved “a strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective.”<sup>6</sup> As he notes in this symposium, Dunlap did not intend the term to have a pejorative meaning. Instead, he was introducing an ideologically neutral concept, whose goal was to capture an important emerging phenomenon and to encourage debate among military and legal strategists within the U.S. armed forces as to how best to confront and engage that phenomenon.<sup>7</sup> For Dunlap, lawfare is “simply another kind of weapon, one that is produced . . . by beating lawbooks into swords.”<sup>8</sup> Moreover, as Dunlap convincingly demonstrates, lawfare is a weapon that is not only wielded by America’s enemies, but also by the U.S. government itself in its global war on terror.<sup>9</sup>

Unfortunately, as lawfare has taken hold in the popular lexicon, it seems to have lost much of the ideologically neutral cast of Dunlap’s original conception. Nowhere is this clearer than in the use of “lawfare” in the debate over the war on terror. In this context, to put it mildly, lawfare has become a loaded term. The Wall Street Journal, for example, has used “lawfare” as a pejorative label to discredit the American Civil Liberties Union (ACLU) and other non-governmental organizations (NGO) who have questioned the legality of the Obama Administration’s treatment of Guantanamo

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will implement the American Service members Protection Act in order to ensure the protection of U.S. military personnel and officials).

<sup>4</sup> Google Search for “lawfare”, GOOGLE (Dec. 1, 2010, 3:00PM), <http://www.google.com> (search for “lawfare”; then follow the Google Search hyperlink); see, e.g., LAWFARE, <http://www.lawfareblog.com> (last visited Dec. 17, 2010); THE LAWFARE PROJECT, <http://www.thelawfareproject.org> (last visited Dec. 17, 2010).

<sup>5</sup> See Dunlap, *supra* note 1, at 5.

<sup>6</sup> Charles J. Dunlap, Jr., *Lawfare Today: A Perspective*, 3 YALE J. INT’L. AFF. 146, 146 (2008).

<sup>7</sup> Charles J. Dunlap, Jr., Visiting Professor, Duke University School of Law and Associate Director, Center on Law, Ethics, and National Security, Presented at Case Western University School of Law Frederick K. Cox International Law Center War Crimes Research Symposium, Does Lawfare Need an Apologia? (Sept. 10, 2010), available at <http://www.au.af.mil/au/aunews/archive/2010/0520/0520Articles/Dunlap0520.pdf>.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 2–4 (discussing lawfare as an American weapon).

detainees and other terrorist suspects.<sup>10</sup> Conservative political pundits have jumped on the bandwagon by decrying as “lawfare” virtually any attempt to apply the rule of law to the conduct of the war on terror. In so doing, they have not only condemned the actions of NGOs like the ACLU, but also the actions of judges hearing detainee cases and the military lawyers who make up the Guantanamo defense bar itself.<sup>11</sup>

Clearly, “lawfare” in the war on terror has strayed considerably from its non-partisan, ideologically neutral roots. Participants in this symposium have richly debated whether the original conception of “lawfare” can be reclaimed. Scott Horton argues that the term was hijacked by the right, became “a tool in a legal demolition derby,” and is thus “irredeemably discredited.”<sup>12</sup> Dunlap, on the other hand, urges us to rescue the hostage and restore lawfare to its original meaning. The key questions are whether such a reclamation project is possible, and whether it is worth the candle. Can “lawfare” be reclaimed from the political pundits and (re)developed into a useful concept for military and legal strategists in the conduct of the war on terror?

While the outcome of such a reclamation project is far from certain, I think it is worth the attempt. But as the wildfire success of Dunlap’s coinage of the term “lawfare” demonstrates, language matters. Thus the first element in a reclamation project is to restore “lawfare” to its original conception and to reassert the neutrality of the term. Lawyers, judges, and legal scholars have a crucial role to play here, as well. Accordingly, a second key element in reclaiming “lawfare” is for American lawyers and judges to re-take the high ground from those who wage “counterlawfare.” In this brief commentary, I will discuss both elements in turn.

## II. RECLAIMING A NEUTRAL CONCEPTION OF LAWFARE

In the war on terror context, at least two conceptions of “lawfare” are currently in vogue. The first defines lawfare as the use of law and legal processes as an instrument or weapon of war. It is this first definition that the political pundits have adopted as their own. But their use of lawfare goes a step further. They have reshaped this first definition into an example of what Wouter Werner calls “reflexive lawfare”: “the use of the term to

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<sup>10</sup> Specifically, the Wall Street Journal condemned NGO efforts to stop the Administration’s use of military commissions to try Guantanamo detainees, as well as its use of targeted killing of terrorist suspects. See Editorial, *The Lawfare Wars*, THE WALL ST. J., Sept. 2, 2010, at A14.

<sup>11</sup> See discussion *infra* Part II.

<sup>12</sup> Scott Horton, *A Kinder, Gentler Lawfare*, HARPER’S, MAG. Nov. 2007, <http://www.harpers.org/archive/2007/11/hbc-90001803>.

discredit an opponent's reliance on law and legal procedure,"<sup>13</sup> or "an instrument to discredit critics of the government."<sup>14</sup>

While conservative political pundits have utilized reflexive lawfare to considerable success over the past few years, it is important to remember that reflexive lawfare in the war on terror finds its roots not in punditry but in the work of the U.S. Government. The highest profile use of reflexive lawfare to date was in the Bush Administration's 2002 National Security Strategy document.<sup>15</sup> While the document does not utilize the term "lawfare" itself, it notes that the United States' "strength . . . will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes, and terrorism."<sup>16</sup> As Scott Horton has pointed out, in the National Security Strategy document, "turning to courts for the enforcement of legal rights, appeals to international tribunals, and terrorism are seen as the elements of a single consistent enemy strategy."<sup>17</sup> Thus, the Bush Administration suggested that "lawyers who defend their clients, or who present their claims to domestic or international courts, might as well be terrorists themselves."<sup>18</sup> In short, "[l]awfare, as defined by Bush Administration officials, is a terrorist tactic."<sup>19</sup> As Horton has convincingly demonstrated, the National Security Strategy was merely the opening salvo in a Bush Administration campaign to use reflexive lawfare to vilify the Guantanamo defense bar.<sup>20</sup>

While reflexive lawfare held particular sway during the Bush years, however, there is another, more neutral conception of "lawfare" that may be gaining ground. Again, Professor Werner's paper for this symposium provides a useful description of this alternative approach. Rather than utilizing the term to discredit an opponent's reliance on law and legal processes, the alternative definition of "lawfare" focuses on what Werner describes as a

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<sup>13</sup> Wouter G. Werner, *The Curious Career of Lawfare*, 43 Case W. Res. J. Int'l L. 61, 69 (2010).

<sup>14</sup> *Id.* at 6 (discussing reflexive lawfare).

<sup>15</sup> See U.S. DEP'T OF DEF., THE NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA 1, 5 (2005), available at <http://www.defense.gov/news/Mar2005/d20050318nds2.pdf>.

<sup>16</sup> See *id.* at 5.

<sup>17</sup> Scott Horton, *State of Exception: Bush's War on the Rule of Law*, HARPER'S MAG. 74, 74, July 2007, <http://www.harpers.org/archive/2007/07/0081595>.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> See Horton, *supra* note 17, at 75. Horton claims that the Bush Administration's strategy against lawfare has "effectively declared war on the rule of law itself" by frustrating attempts to provide Guantanamo Bay prisoners with legal representation.

kind of “critical self-reflection” on the relationship between law and war.<sup>21</sup> He relies on David Kennedy’s work, asserting that “lawfare” can be used to describe the “art of ‘managing law and war together.’”<sup>22</sup>

This alternative, more flexible conception of “lawfare” seems to be truer to Dunlap’s original vision and has potential in restoring the concept of lawfare to its original ideologically neutral grounding. It contemplates the use of law and legal processes as an instrument of war, but it does not focus exclusively on this narrow definition, encompassing instead a broader discussion of the proper role of law in the management of war. Moreover, rather than condemning the use of “lawfare” as a weapon that is wielded exclusively by America’s enemies, the “critical self-reflection” conception of lawfare acknowledges the fact (which Dunlap has emphasized repeatedly in his recent writings) that lawfare is simply a neutral instrument of war, one that can be wielded by all sides in the war on terror.

There is evidence that this alternative conception of lawfare may be gaining traction in the context of the war on terror. There is, of course, Dunlap’s own recent scholarly work, and that of other scholars who are attempting to develop “lawfare” into a useful rubric for military and legal strategists to explore the uses and abuses of law as an instrument of war. In so doing, these scholars are ensuring that in the legal scholarship, at least, “lawfare” avoids the pejorative cast that the term has taken on in the popular discourse.<sup>23</sup>

Even in the popular discourse, however, change may be afoot. In September 2010, three prominent national security scholars founded a new blog entitled “Lawfare: Hard National Security Choices.”<sup>24</sup> The blog has quickly emerged as one of the premier sites for serious discussion of national security issues. In introducing the blog, one of its founders, Benjamin Wittes of the Brookings Institution, offered the following explanation for the blog’s appropriation of the term “lawfare”:

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<sup>21</sup> Werner, *supra* note 13, at 70 (discussing the “critical self-reflection” aspects of Kennedy’s work, and noting that reflexive lawfare “is largely decoupled from critical self-reflection”).

<sup>22</sup> *Id.* (quoting DAVID KENNEDY, OF WAR AND LAW 125 (2006)).

<sup>23</sup> See Dunlap, *supra* note 7, at 1–2. Dunlap categorizes lawfare “as simply another kind of weapon” which can be used for “good or bad purposes, depending upon the mindset of those who wield it.” See also Kelly D. Wheaton, Strategic Lawyering: Realizing the Potential of Military Lawyers at the Strategic Level (Mar. 16, 2006) (unpublished Masters of Strategic Studies Degree, U.S. Army War College) (discussing the role of “both proactive and responsive legal advice and support in lawfare” for military lawyers in engaging the war on terror), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?Location=U2&doc=GetTRDoc.pdf&AD=ADA449201>.

<sup>24</sup> See LAWFARE, <http://www.lawfareblog.com> (last visited Dec. 17, 2010). The founders and regular bloggers are Jack Goldsmith of Harvard, Benjamin Wittes of the Brookings Institution, and Robert Chesney of the University of Texas.

We mean to devote this blog to that nebulous zone in which actions taken or contemplated to protect the nation interact with the nation's laws and legal institutions . . . . The name Lawfare refers both to the use of law as a weapon of conflict and, perhaps more importantly, to the depressing reality that America remains at war with itself over the law governing its warfare with others. . . . It is our hope to provide an ongoing commentary on America's lawfare, even as we participate in many of its skirmishes.<sup>25</sup>

Thus the new Lawfare blog reintroduces into the popular discourse a notion of "lawfare" that is in keeping with the "critical self-reflection" conception of the term.<sup>26</sup> For those who worry that the term has been hijacked and that an ideologically neutral conception of "lawfare" has disappeared from the popular discourse, this blog provides some evidence that they may have sounded its death knell a bit too soon.

### III. RE-TAKING THE HIGH GROUND FOR AMERICAN JUDGES AND LAWYERS

Perhaps the most pernicious aspect of reflexive lawfare in the war on terror is that it is being used not merely to discredit terrorist suspects who attempt to assert their rights before the U.S. courts: It is also being used to discredit the lawyers who assist them, and even, in some instances, the judges who hear their cases. The most celebrated example of this use of reflexive lawfare is, of course, the infamous case of Charles "Cully" Stimson, who served as the Deputy Assistant Secretary of Defense for Detainee Affairs in the Bush Administration. In an interview in 2007, Stimson expressed his dismay that attorneys from major U.S. law firms were representing detainees at Guantanamo. He named several of the firms, hinted that their funding might come from terrorist sources, and commented, "I think, quite honestly, when corporate C.E.O.'s see that those firms are representing the very terrorists who hit their bottom line back in 2001, those C.E.O.'s are going to make those law firms choose between representing terrorists or representing reputable firms. . . . And we want to watch that play out."<sup>27</sup>

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<sup>25</sup> Benjamin Wittes, *Welcome to Lawfare*, LAWFARE (Sept. 12, 2010, 12:58 AM), <http://www.lawfareblog.com/2010/09/welcome-to-lawfare-2/>.

<sup>26</sup> See JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 60 (2009). Jack Goldsmith, one of lawfareblog.com's founders, wrote a 2002 memo for the Bush Administration in which he expressed concern about a growing "web of international and judicial institutions that today threaten USG interests." See also Werner, *supra* note 13, at 68. Werner concludes that Goldsmith's views in the 2002 memo certainly reflect a "reflexive lawfare" conception of the term "lawfare."

<sup>27</sup> See Neil A. Lewis, *Official Attacks Top Law Firms Over Detainees*, N.Y. TIMES, Jan. 13, 2007, at A1, available at <http://www.nytimes.com/2007/01/13/washington/13gitmo.html> (discussing and quoting Stimson radio interview).

While Stimson reserved his criticism for law firms representing the detainees, others have attempted to discredit judges themselves. For example, in an article entitled *Lawfare Strikes Again*,<sup>28</sup> Andrew McCarthy of the National Review condemned a decision by the Fourth Circuit Court of Appeals holding that the President did not have inherent constitutional authority to order seizure and indefinite detention of an alien legal resident suspected of terrorism.<sup>29</sup> McCarthy wrote:

Strike another blow for lawfare: The use of the American people's courts as a weapon against the American people in a war prosecuted by the president—the only public official elected by all Americans—under an authorization for the use of military force overwhelmingly passed by the American people's representatives in congress. And all for the benefit of an alien sent here to attack us.<sup>30</sup>

Unlike Stimson, McCarthy reserved his vitriol for the judges who, in his view, had helped to free a suspected terrorist. He complained that despite the ongoing threat of terror attacks within the United States, the federal court had “intervened on the enemy's behalf,” and he noted that it was “worth observing” that the decision to “intervene” was written by a Clinton appointee.<sup>31</sup>

A critical element in reclaiming “lawfare” and restoring it to its original meaning is to re-take the rhetorical high ground from the Stimsons and McCarthys of the world. Those who engage in this sort of reflexive lawfare are playing an exceedingly dangerous game. By associating the work of American lawyers and judges involved in terror cases with a shadowy form of “lawfare” engaged in by America's terrorist enemies, conservative pundits like McCarthy discredit and undermine the rule of law and the legitimacy of the American legal system itself. For this reason alone, the project to reclaim “lawfare” and to restore it to its original, ideologically neutral meaning is worth the effort. Given the high regard that they (still) enjoy with the American public, American lawyers and judges have a critical role to play in this restoration project.

Nor should we underestimate the ability of America's lawyers to re-take the rhetorical high ground and to discredit the work of the reflexive lawfare pundits. Indeed, Cully Stimson's story serves to illustrate the power that resides in the American bar when it chooses to engage in the battle over lawfare. Stimson's attack on law firms representing Guantanamo detainees was met with a firestorm of outrage by lawyers, legal ethicists, and bar as-

<sup>28</sup> Andrew McCarthy, *Lawfare Strikes Again*, NATIONAL REVIEW ONLINE (June 12, 2007), <http://www.nationalreview.com/articles/221258/lawfare-strikes-again/andrew-c-mccarthy#>.

<sup>29</sup> See *id.* (discussing *al-Marri v. Wright*, 487 F.3d 160 (4<sup>th</sup> Cir. 2007)).

<sup>30</sup> See McCarthy, *supra* note 28.

<sup>31</sup> *Id.*



sociation officials. The president of the American Bar Association led the attack, calling Stimson's comments "deeply offensive to members of the legal profession, and we hope to all Americans."<sup>32</sup> In response to the torrent of criticism, the Bush Administration quickly distanced itself from Stimson's comments. Less than a month later, Stimson resigned, with a Defense Department spokesman noting that the controversy had "hampered his ability to be effective" in his office.<sup>33</sup> Stimson's downfall was a major victory for America's lawyers, and proof that they can play a critical role in lawfare's reclamation project.

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<sup>32</sup> See Lewis, *supra* note 27.

<sup>33</sup> See Pauline Jelinek, *Defense Official Resigns Over Remarks*, WASH. POST (Feb. 2, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/02/02/AR2007020200940.html>.